Supreme Court, U.S.
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No. 99-236

IN THE
SUPREME COURT OF THE UNITED STATES

GILBERT E. SLOOP,
Petitioner,

v.

ABTCO, INCORPORATED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT ABTCO, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED

WHETHER THE FOURTH CIRCUIT ERRED IN FINDING THAT AN EMPLOYEE WHO WAS TOO INTOXICATED TO ATTEND WORK AFTER HIS HEAVY CONSUMPTION OF ALCOHOL DURING A HOLIDAY WEEKEND WAS NOT ENTITLED TO RECEIVE LEAVE UNDER THE ***FMLA***?

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Other

Family and Medical Leave Act of 1993
("FMLA" or "Act") . . . . . *passim*

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IV.

STATEMENT OF THE CASE

Petitioner Gilbert Sloop ("Sloop" or "Petitioner") was discharged from his employment with Respondent ABTco, Inc. ("ABTco" or "Respondent" or "Company"), after being absent from work on Tuesday, July 5, 1994 due to his admitted heavy consumption of alcohol over the Fourth of July Weekend.

Sloop had missed work due to drinking on multiple occasions during the previous two years. (Pet. App. 2-3). In June of 1993, after missing work because of his consumption of alcohol, Sloop was warned in writing that he could not let drinking affect his ability to work anymore, and any recurrence of the problem would result in his termination. (Pet. App. 3, 10). Nevertheless, Sloop was again unable to come to work on January 3, 1994 following heavy drinking during the New Year's holiday weekend. (Pet. App. 3, 10). Instead of firing Sloop at that time, the Company allowed him to continue working under the condition that he prevent alcohol consumption from interfering with his work. (Pet. App. 3, 10). The Company issued another warning letter to Sloop emphasizing that "[t]his is a last and final warning!"

Despite the warnings by the Company, Sloop drank heavily during the Fourth of July Weekend in 1994, resulting in his having a blood-alcohol level of .26 as of 11:54 p.m. on Monday, July 4, 1994, the late evening before the next morning when he was due at work. (Pet. App. 21). According to Sloop's wife, Shelby, his consumption of alcohol that weekend was the worst she had ever witnessed, causing her to call the police and sign involuntary

commitment papers for him. (Pet. App. 11). Sloop was scheduled to be at work at 7:00 a.m. the next morning, July 5, 1994. (Pet. App. 4-5, 21). Sloop admitted at his deposition that he was unable to work on July 5, 1994, due to his heavy drinking on July 4, 1994. (App. 2a). His blood alcohol level in the morning of July 5, 1994 was still .05. (Pet. App. 4-5, 21).

During the evening of July 4, 1994, Sloop's wife contacted Sloop's supervisor at ABTco, Wagoner, and told him that Sloop would be unable to come to work the next morning, July 5, 1994, because of drinking. (Pet. App. 3, 12). Contrary to Sloop's representations in his Petition, there is no evidence in the record that Wagoner ever "approved" Sloop's July 5, 1994 absence. Sloop's wife testified that Wagoner merely told her that he "would take care of it." (Pet. App. 35). Regardless, as found by the Fourth Circuit, Swift, the Human Resources manager, had greater decision-making authority than Wagoner on whether Sloop could remain employed after once again failing to comply with the final warning letters instructing Sloop to never again miss work on account of his drinking. (Pet. App. 5).

On July 5, 1994, Sloop's wife contacted Swift and told him Sloop would not be at work for several weeks. (Pet. App. 3). She claims to have asked Swift if Sloop could have leave for this period of absence. (Pet. App. 3). In response, on July 7, 1994, Swift notified Sloop's wife that Sloop had been terminated for once again being absent due to excessive consumption of alcohol. (Pet. App. 3). After remaining in a detoxification center until July 12, 1994, Sloop was involuntarily committed to a residential treatment facility, pursuant to a state court order. (Pet. App. 3).

Sloop, in violation of the final warning letter issued in January 1994, allowed his consumption of alcohol to cause him to miss work. (Pet. App. 3). As acknowledged by Petitioner, the reason Sloop was terminated was because the Company "had given petitioner several chances to correct his `drinking problem' and several warnings that if he did not, it would terminate him." (Pet. 10-11).

On June 26, 1996, shortly before the expiration of the limitations period, Sloop brought an action under the ***Family and Medical Leave Act of 1993*** ("***FMLA***" or "Act"), 29 U.S.C. § 2617(c)(1), claiming, without merit, that he was unlawfully denied leave to which he was entitled under the Act.

V.

THE PETITION SHOULD BE DENIED

A. Introduction

"A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. Among the various reasons considered by the Court in deciding to review a Circuit Court of Appeals decision are: (1) whether the Circuit Court entered a decision in conflict with a decision issued by another Circuit Court on some important matter; (2) whether the Circuit Court decided a federal question in a way that conflicts with a decision by a state court of last resort; (3) whether the Circuit Court decided an important question of federal law in a way that conflicts with relevant decisions of this Court; or (4) whether the question presented is one that should be settled by the Supreme Court. Supreme Court Rule 10(a), (c).

The Question Presented by Petitioner is whether the ***Family and Medical Leave Act of 1993*** (***"FMLA"***) entitles an employee to be absent from work due to the consumption of alcohol or use of controlled substances, precluding an employer from disciplining such misconduct. Petitioner contends, with no supporting case law, that his absence should be totally protected by the ***FMLA*** because **after** he became too intoxicated to be able to report to work on July 5, 1994, he was involuntarily committed to a detoxification center, and, a week later, was involuntarily committed to a treatment program. The instant case does not meet any of the criteria for Supreme Court review, as required by Rule 10. In addition, the instant Petition must be rejected because the Fourth Circuit correctly decided the Question Presented.

B. The Fourth Circuit Correctly Decided the Question Presented.

The Fourth Circuit focused on the essential issue in the instant case: the cause of Sloop's absence on July 5, 1994. In affirming the dismissal of Sloop's ***FMLA*** claim, the Fourth Circuit properly held that the ***FMLA*** does not immunize an employee from discipline when his consumption of alcohol or use of a controlled substance causes an absence from work. Sloop had been issued final warning letters in June 1993 and again in January 1994, following binge drinking episodes, and told that he would face termination if he ever again permitted his consumption of alcohol to interfere with his working. (Pet. App. 3, 10).

Despite having been warned that he would be discharged if his alcohol consumption prevented his being able to perform his job, Sloop drank so heavily during the Fourth of July Weekend, that at 11:56 p.m. on July 4, 1994 his blood alcohol level was .26. (Pet. App. 21). Sloop was scheduled to be at work at 7:00 a.m. the next morning, at which time his blood alcohol level was still at .05. (Pet. App. 5, 21). In his deposition, Sloop admitted that his heavy drinking on July 4, 1994 prevented him from being able to come to work the next morning. (App. 2a).

Rejecting Sloop's claim that the ***FMLA*** protected his absence on July 5, 1994 and thereafter, the Fourth Circuit, the District Court, and the Magistrate Judge all held that the ***FMLA*** does not require an employer to grant leave for absences caused by current substance abuse.

Finding no language in the ***FMLA*** addressing whether substance abuse may, under some circumstances, be considered a "serious health condition" which can entitle an employee to medical leave under the Act, (Pet. App. 6), the Fourth Circuit determined that:

> There is **no evidence** that Congress intended the FMLA to cover medical leave precipitated by substance abuse without regard for the personal responsibility of the employee.

(Emphasis added).

Pursuant to its responsibility to issue regulations enforcing the ***FMLA***, ***29 U.S.C. § 2654***, the Department of Labor promulgated the following rule to clarify when substance abuse can be the basis for ***FMLA*** leave:

> [S]ubstance abuse may be a serious health condition if the conditions of this section [enumerating what is a "serious health condition"] are met. However, ***FMLA*** leave may **only be taken for treatment** for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, **absence because of use of the substance, rather than for treatment, does not qualify for *FMLA*** leave.

29 C.F.R. § 825.114(d) (emphasis added) (Pet. App. 4). The court held that the plain and unambiguous meaning of the regulation is that:

> [A]n employer is not required to grant an employee leave for work missed because the employee has consumed alcohol (or any other substance resulting in impairment of the senses).

(Pet. App. 22). Based upon Section 825.114(d), the District Court stated that it was:

> [C]onfident that an employee's absence from work is justified under the ***FMLA*** only when the employee is seeking treatment from a health care provider, and that treatment was not precipitated by the employee's recent use of the substance.

(Pet. App. 22).

In dismissing Sloop's ***FMLA*** claim, the District Court found that Sloop was not able to attend work on July 5, 1994, not because of his treatment, but because of his heavy consumption of alcohol. (Pet. App. 5, 22-23). The court held that there was no intention in the ***FMLA*** "for an employee to be entitled to leave for work missed due to his use of alcohol, subsequent intoxication, and involuntary commitment." (Pet. App. 22).

The lower courts correctly found Sloop's absence on July 5, 1994 was precipitated by his **use** of alcohol on July 4, 1994, and, therefore, was not protected by the ***FMLA***, pursuant to Section 825.114(d). Accordingly, the Fourth Circuit properly affirmed dismissal of Sloop's ***FMLA*** claim, as the evidence established that Respondent did not violate the

Act. Because the decision of the Fourth Circuit was correct, there is no reason for this Court to consider the Petition.

C. There is No Split in the Circuits Necessitating Resolution by This Court

The ***FMLA*** was passed in 1993, just six (6) years ago. 29 U.S.C.A. § 2601. No published federal court decisions at any level have addressed the availability of leave under the ***FMLA*** for substance abuse problems. It is obvious that while many other ***FMLA*** issues have resulted in reported decisions, questions involving the application of the substance abuse regulation have been non-existent.

The Fourth Circuit's decision in this case is the only one to interpret the ***FMLA*** and its regulations in the context of substance abuse. Consequently, there is no split in the Circuits, and no burning need for Supreme Court resolution exists. Furthermore, because the *per curiam* opinion was designated to be unpublished, it is not binding on the courts in the Fourth Circuit. Accordingly, it is premature for this Court to consider the issue.

D. The Rule of Law Applied By the Fourth Circuit Is Not Challenged

A petition is "rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law." Supreme Court Rule 10. In this case, the Fourth Circuit relied upon the Department of Labor's regulation that interpreted when the ***FMLA*** provides protection for absences relating to substance abuse. *See*, 29 C.F.R. § 825.114(d) (Pet. App. 1, 5-6).

Petitioner does not contest the regulation applied by the Fourth Circuit Court of Appeals, rather, Petitioner merely argues, without merit, that the Fourth Circuit misapplied the regulation in holding that the ***FMLA*** does not require leave to be granted for an absence caused by the consumption of alcohol, even if the employee is later treated for an alcohol problem. This interpretive dispute does not merit Supreme Court review.

E. The Question Presented Is Narrow and Has Limited Application

The scope of the issue raised by the Petition is too narrow to warrant review by this Court. The Question Presented is not whether the ***FMLA*** may, under some circumstances, provide leave for alcoholism or substance abuse problems. Rather, Sloop's ***FMLA*** claim raises a much more narrow issue: Does the ***FMLA*** require an employer to grant leave to cover an employee's absence caused by current or recent alcohol consumption, as long as the employee was subsequently treated for his alcohol problem?

While Respondent believes in the importance of upholding the principle that the ***FMLA*** did not intend to preclude employers from disciplining employees whose current consumption of alcohol or controlled substances prevent them from performing their jobs, the application of a decision on the Question Presented will be very limited. As noted above, the issue has yet to be addressed by any federal court in a published decision. Because the Question Presented concerns only the unusual situation of an employee being absent due to alcohol consumption who, shortly thereafter, receives treatment, it is not worthy of certiorari.

F. Sloop's Petition Seeks Review of Issues Not Appealed

On pages 14 and 15 of his Petition, Sloop argues that he was "terminated ... because he had requested extended leave for treatment," suggesting a retaliation claim. This issue is not encompassed within the Question Presented, as framed by Petitioner. Nor was it included as one of the issues to be reviewed on appeal by the Fourth Circuit. (App. 5a). The Fourth Circuit did not rule on the claim, except to correctly find, in a footnote, that Sloop had been "fired for disregarding the previous warnings to not miss work due to binge drinking." (Pet. App. 5). Because Petitioner seeks to include issues not raised in the Fourth Circuit or in the question presented to this Court, his Petition should be denied.

G. Absurd Consequences Would Result from Petitioner's Requested Interpretation

Petitioner's position on the Question Presented would result in limitations on an employer's ability to enforce rules against substance abuse. Where a party's interpretation would lead to "absurd or futile results," it should be rejected. ***EEOC v. Commercial Office Products Co.***, 486 U.S. 107, 120 (1988).

As noted by the Fourth Circuit, "Congress intended the ***FMLA*** to be `based on the same principle[s] as ... other labor laws that establish minimum standards for employment.'" (Pet. App. 6) (quoting, ***Manuel v. Westlake Polymers Corp.***, 66 F.3d 758, 763 (5th Cir. 1995) (citing a Senate report)). The Fourth Circuit correctly recognized that labor laws such as the ***Americans with Disabilities Act*** and the

Rehabilitation Act of 1973 have never provided protection for misconduct arising from an employee's use of alcohol. (Pet. App. 6) (citing, ***Little v. Federal Bureau of Investigation***, 1 F.3d 255, 259 (4th Cir. 1993)).

Under Petitioner's proposed interpretation of the ***FMLA*** and its regulations, an employee who misses work because of using controlled substances or consuming alcohol would be immune from discipline by the employer, as long as the employee also received treatment for substance abuse. Even if the employee had a history of missing work due to the abuse of alcohol or controlled substances, as was the case with Sloop, the employer would be required to grant him leave for the absence and could not discipline the employee for again missing work due to current alcohol abuse. This absurd position has been rejected by the Equal Employment Opportunity Commission ("EEOC") when, in promulgating Technical Guidelines under the ***Americans with Disabilities Act***, 42 U.S.C. §§ 12101-12213, stated:

> [A]n applicant or employee who tests positive for an illegal drug cannot immediately enter a rehabilitation program and seek to avoid the possibility of discipline or termination by claiming that s/he is now in rehabilitation ....

Shafer v. Preston Memorial Hosp. Corp., 107 F.3d 274, 277-78 (4th Cir. 1997) (quoting, EEOC, ***A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act***, § 8.3. Because the Question Presented would yield absurd results if Petitioner's position was adopted, this Court must deny the Petition.

H. If the Department of Labor or Congress Disagree With the Fourth Circuit's Interpretations, They Can Amend the Regulations or the Statute

This case involved the Fourth Circuit's interpretation and application of the ***FMLA*** and its regulations to Sloop's claim. If either the Department of Labor or Congress concludes that the Act should protect employees who miss work due to the recent consumption of alcohol or abuse of controlled substances, the Act or its regulations can be amended to extend the ***FMLA*** to such circumstances.

Because the Fourth Circuit's interpretation of the Act and regulations can be nullified through amendment, there is no compelling reason for the Court to become involved in this case.

VI.

CONCLUSION

For the reasons set forth above, review of the Fourth Circuit's decision in this case is neither necessary nor appropriate. Therefore, Respondent ABTco, Inc. respectfully urges this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: September 2, 1999

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Record No. 98-2440

Gilbert E. Sloop, Plaintiff-Appellant,	)
v.	)
ABTco, Inc., Defendant-Appellee	)

JOINT APPENDIX

Appeal from the United States District Court
for the Western District of North Carolina
Statesville Division

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* * *

A. Probably so.

Q. Could you have gone to work the morning of July 5th?

A. I doubt that I could.

Q. You were still pretty intoxicated, weren't you?

A. Yes.

Q. You were involuntarily committed, were you not –

A. Yes, I was.

Q. – by your wife?

A. Yes.

Q. The court ordered you into a 180 day treatment program, wasn't it?

A. Twenty-eight day treatment program and followed up, finish it on out with 180 days.

Q. The judge ordered you to take Antabuse, didn't he?

A. He says if I could and all. Some people can't.

Q. Can you physically take it?

A. I did years ago, but I –

Q. Do you recall the name of the judge you went before, Mr. Sloop?

A. I can't think of it right now, but it's Byrd, Helms and –

Q. He ordered you for 28 days of inpatient treatment at Davidson Alcoholic Care; did he not?

A. Yes.

* * *

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Record No. 98-2440

Gilbert E. Sloop,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
ABTco, Inc.,	)
Defendant-Appellee	)
	)

BRIEF OF PLAINTIFF-APPELLANT

Appeal from the United States District Court
for the Western District of North Carolina
Statesville Division

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* * *

[p.2]

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether Sloop, who was terminated while in treatment for his disease of alcholism, was denied his right to leave in violation of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.*, when his treatment was precipitated by his use of alcohol?

STATEMENT OF THE CASE

Procedural Background

Sloop filed this action on June 26, 1996, alleging that he was discharged from his employment with ABTCO in violation of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et. seq., JA 9.* ABTCO filed its answer denying the material allegations of the complaint on July 12, 1996. *JA 15.*

Following discovery, both parties filed motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *JA 25-26.* United States Magistrate Judge H. Brent McKnight filed a Memorandum and Recommendation on February 27, 1998, recommending taht ABTCO's motion be granted. *JA 341.* Sloop filed objections to the Magistrate Judge's recommendations pursuant to 28 U.S.C. § 636(b)(1). *JA 352.* United States District Court Judge Richard L. Voorhees filed his Memorandum and Order, and Judgment dismissing Sloop's claim on August 26, 1998. *JA 357, 378.* Sloop filed his Notice of Appeal, requesting

review by this Court on September 24, 1998. *JA 381.*

Facts

Sloop was born on October 24, 1942. He lives in North Wilkesboro, North Carolina with his wife, Shelby Sloop. Mr. And Mrs. Sloop have three children who are

* * *